UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of

G4S/WSI SAVANNAH RIVER SITE

Employer

and **Case 10-RC-126849**

INTERNATIONAL GUARDS UNION OF AMERICA

Petitioner

PETITIONER'S STATEMENT IN OPPOSITION TO REQUEST FOR REVIEW

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The Petitioner, International Guards Union of America, submits that the Regional Director's Decision and Direction of Election correctly recited the material facts and applied officially reported Board precedent to those facts to arrive at the correct conclusion that the lieutenants and sergeants employed at the Savannah River Site are not supervisors within the meaning of the Act. The Employer in its Request for Review has not shown that (1) substantial questions of law or policy are raised because of the Regional Director's departure from officially reported Board precedent or that (2) the RD's decision on the supervisory authority of lieutenants and sergeants is clearly erroneous on the record.

The Employer has selectively cited to pieces of evidence but has ignored substantial contrary evidence, especially much concrete evidence regarding specific conduct which demonstrates that the lieutenants and sergeants do not have or exercise the authority of supervisors. The RD correctly applied *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006),

and *G4S Regulated Security Solutions, a division of G4S Secure Solutions (USA) Inc., f/k/a the Wackenhut Corporation*, 358 NLRB 160 (2012).

We will provide the Board with an overview of the facts and the precise facts supported by the record which support the Regional Director's decision and will point out deficiencies in the evidence as stated by the Employer (Company or WSI).

In its Request for Review, the Company has argued that lieutenants have the authority to assign employees, to reward them, and to adjust their grievances, and that sergeants and lieutenants have the authority to assign employees, responsibly to direct them, and to discipline them, and that lieutenants have the additional authority to adjust their grievances and to reward them.

BACKGROUND FACTS

The Company employs 30 sergeants and 46 lieutenants at the Savannah River Site – 26 sergeants in Special Response Team (SRT), three in the Perimeter Protection Department (PPD) and one in Canine. Lieutenants are assigned to each shift in several areas or categories of the site -- K area (sometimes called K Area Complex), H area, PPD, SRT, Law Enforcement (LE) and Canine. In some areas, a lieutenant is assigned to a headquarters duty post, working Monday through Friday on the dayshift.

The Savannah River Site is a US Department of Energy facility spread over 310 square miles which receives, stores, and processes weapon grade special nuclear material, produces tritium, contains a research facility and performs some other functions. (Tr. 22-23) The Protective Force, which provides security for the site, is made up of eight security officers (SOs) who are unarmed and numerous security police officers (SPOs) who are armed. SPOs are classified as 1, 2 or 3, depending upon their level of qualifications and

fitness, including All the SPOs in SRT are SPO3s. The Protective Force also includes SPOs classified as SPO Specials who work in the Central Alarm Service (CAS) and SPOs called handlers who work in the Canine Section

Lieutenants in each area serve as either a shift lieutenant or a headquarters lieutenant. The shift lieutenants work twelve hours at a time and are assigned to one of four shifts to provide 24-hour coverage. They work rotating shifts, weekends and holidays. (Tr. 177) The headquarters lieutenants, who work straight days Monday through Friday, perform various duties and also provide relief to shift lieutenants. (Tr. 177) The H area (referred to on the job description, Employer Ex. 29, as H/T/L), for example, has eight shift lieutenants (two on each of the four shifts) and three headquarters lieutenants. Sergeants work in only three areas of the facility – SRT, PPD, and one in Canine who spends virtually all of his time in training dogs and dog handlers rather than exercising any authority over SPOs. All are hourly employees who are paid at overtime rates over 40 hours per week, in accordance with the Fair Labor Standards Act. (Tr. 135-36)

The Company Protective Force SOs and SPOs are represented for collective bargaining by the United Pro-Force of Savannah River (UPPSR), Local 125 (Local 125). The Company is party to a contract with Local 125, Petitioner Ex. 5. See Tr. 73-74. That bargaining unit has a somewhat fewer than 300 employees, which includes eight unarmed SOs. (Tr. 157)

The highest Company official at the site is the general manager, followed by a deputy general manager, and then various directors. Under the directors are managers, called majors in the Protective Force (except for the manager of Law Enforcement who is called a chief). The majors are responsible for different areas, and under each major is a

captain. The lieutenants report to a captain or major. (Tr. 20-21) Majors and captains work a straight dayshift, while shift lieutenants work a rotating shift to cover 24 hours every day and headquarters lieutenants work dayshifts Monday through Friday.

APPLICABLE PRINCIPLES

In *NLRB v Kentucky River Comm. Care*, 532 U.S. 706, 710-13 (2001), the Supreme Court affirmed the long-standing Board rule that the party asserting supervisory status bears the burden of proving that claim. Mere job title or job description fails to satisfy that burden. *Chicago Metallic Corp.*, 273 NLRB 1677, 1688-89 (1985), aff'd in relevant part, 794 F.2d 527 (9th Cir. 1986).

This case is governed in large measure by the Board's recent decision in *G4S Regulated Security Solutions, a Division of G4S Secure Solutions (USA) Inc., f/k/a the Wackenhut Corporation*, 358 NLRB No. 160 (2012), involving an employer related to the Employer here, whose employees provided security at a privately owned nuclear power plant. There the Board found that lieutenants there were not supervisors. In the course of its opinion, the Board enunciated the principles applicable to supervisor status, particularly in the security business:

> To establish that Frazier and Mack are supervisors, the Respondent must prove by a preponderance of the evidence: (1) that they held authority to engage in any one of the 12 enumerated supervisory functions listed above; (2) that their "exercise of such authority [was] not of a merely routine or clerical nature, but require[d] the use of independent judgment"; and (3) that their authority was held "in the interest of the employer." See, e.g., NLRB v. Kentucky River Community Care, Inc., 532 U.S. 706, 710-713, 121 S. Ct. 1861, 149 L. Ed. 2d 939 (2001); Oakwood Healthcare, Inc., 348 NLRB 686, 687 (2006). The Respondent can prove that they had the requisite supervisory authority either by demonstrating that they actually performed a supervisory action or by showing that they effectively recommended that it be done. Oakwood,

> above. Further, "to exercise 'independent judgment' an individual must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data." Id. at 692-693. A "judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement." Id. at 693.
>
> Because the Respondent bears the burden of proving supervisory status, the Board must hold against the Respondent any lack of evidence on an element necessary to establish supervisory status. See, e.g., Dean & Deluca New York, Inc., 338 NLRB 1046, 1048 (2003). The Respondent has not proven supervisory status where the record evidence is inconclusive or otherwise in conflict. See, e.g., Phelps Community Medical Center, 295 NLRB 486, 490 (1989). Likewise, "mere inferences or conclusionary statements, without detailed, specific evidence, are insufficient to establish supervisory authority." Alternate Concepts, Inc., 358 NLRB No. 38, slip op. at 3 (2012); see also Avante at Wilson, Inc., 348 NLRB 1056, 1057 (2006); Golden Crest Healthcare Center, 348 NLRB 727, 731 (2006). Also, job descriptions, job titles and similar "paper authority," without more, do not demonstrate actual supervisory authority. Golden Crest, supra.

As noted in *G4S Regulated Security Solutions*, and in Oakwood Healthcare, Inc., supra at 693, the exercise of "independent judgment" is to be contrasted with actions that are "merely routine or clerical." To exercise independent judgment, the individual "must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data." Id at 694. "[A] judgment is not independent if it is dictated or controlled by detailed instructions . . . ." Id. at 693. "[T]he mere existence of company policies," however, "does not eliminate independent judgment from decision-making if the policies allow for discretionary choices." Id.

The Board analyzes the twelve statutory criteria on a case-by-case basis. *Providence Hospital*, 320 NLRB 717 (1996), enf'd 121 F.3d 548 (9th Cir. 1997). The Board refrains

from construing supervisory status too broadly lest expansive construction deny individuals protections under the Act. *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 399 (1996); *Adco Electric*, 307 NLRB 113 (1992).

DISCIPLINE OF EMPLOYEES

Sergeants

The Company offered no substantive testimony that sergeants have the authority to discipline, or in fact, do discipline employees. It relies on two reprimands signed by sergeants (Employer Ex. 16, p. 8, and 10, p. 2). (Employer's Petition for Review, or EPFR, p. 18) The captain for the area, Capt Frails, an admitted supervisor, however, also signed each of those reprimands. Clearly, the sergeants did not sign them without approval of the captain, and as Capt. Frails did not testify, the record is bare of any testimony regarding the circumstances of these reprimands. Capt. Frails could well have directed the sergeant to sign them.

The testimony of actual sergeants shows that they do not give discipline. Sgt. Fish, who has been a sergeant since 1996, has never given a corrective counseling or discipline of any type. (Tr. 891, 902) The one time he spoke to an SPO about his haircut (a "fad type haircut" which he believed was not in compliance with the work rules), he told him that the next time the captain or major sees him, he might want to square the haircut away. (Tr. 902-03) Fish does not know whether this SPO was disciplined because of his haircut. (Tr. 904)

SRT Sergeants do not check timesheets for SPOs and are not made aware of the number of tardies they incur. (Tr. 890)

Sgt. Still testified that, as a sergeant for twenty years, he has never given a corrective counseling, discipline, or even a notice of pending disciplinary action. He merely gives "on the spot" corrections, but usually the employees correct it themselves. (Tr. 984) On cross examination, Still gave an example of an on-the-spot correction such as telling someone, "[Y]ou need to move quicker or whatever." Such low-level correction does not amount to true discipline within the Section 2(11). See *Westlake United Corp,* 236 NLRB 1114, 1115 (1978), in which "shift supervisors" were found to be employees even though they told employees such direction as "we've got to get those molds loaded ... we got this coming out in 20 minutes ... let's watch it when you cut this wood next time ... I want it the right size." While he may check SPOs and SOs to see if they are impaired or have alcohol on their breath, any SPO who observes that another SPO may be impaired is supposed to report it. (Tr. 987) If the sergeant smelled alcohol on a SPO or SO (and there is no evidence that one ever has), he would not take action to send that person for drug or alcohol testing but would simply notify the lieutenant. (Tr. 982)

The Employer argues that the RD erred in finding that sergeants do not have disciplinary authority simply because no sergeant who testified had actually issued a corrective counseling. (EPFR, p. 44) The burden of proving supervisory authority is, of course, on the Employer here (and the Employer did not introduce any corrective counseling forms signed by sergeants even though it introduced several signed by lieutenants), so the fact that no sergeant had issued a corrective counseling supports the RD's overall conclusion that the Company had not met its burden.

As discussed in detail below, corrective counselings are not formal discipline. In any case, the Employer did not introduce any corrective counseling forms signed by a sergeant although it offered several signed by lieutenants (Employer Ex. 16).

The Company claims that Sgt. Fish followed his major's email directive to see that the three SPOs on his team were wearing their nametags during muster, the daily meeting of employees at the beginning of each shift. (EPFR, pp. 20-21) While this is not evidence that sergeants have authority to discipline, what actually happened was described by Sgt. Fish. He brought the email to the attention of his team members and recommended very highly that they wear their name badges, telling them that the major put out an email about this, and they all complied with the major's email. (Tr. 938) The Company offered no evidence that Sgt. Fish would have been disciplined or otherwise held accountable if his team members continued to fail to wear name badges.

Lieutenants

The authority of the lieutenants to discipline employees is severely limited. The only counseling that they can give on their own is a corrective counseling which is not part of the formal disciplinary procedure which begins with a written warning. The Company's standard procedure on the topic, Procedure 1-2550 (Employer Ex. 9), page 4, describes corrective counseling as follows:

> Corrective counseling is the lowest level of informal discipline intended to provide the employee initial notice of a minor infraction or a performance issue that may result in a higher level of formal discipline if repeated.

The Company's labor relations manager, Mike Robinson, has told the former president of the union representing the SPOs, SOs and CAS employees that corrective counseling is not discipline. (Tr. 946)

The Company produced no evidence that any corrective counseling ever actually resulted in formal discipline or had an effect on an employee's status. Nor did the Company show that lieutenants actually used independent judgment in issuing corrective counseling. In the absence of such a showing, the Company has not shown they have the statutory authority to discipline. *Ball Plastics Division*, 228 NLRB 633 (1977).

As the procedure describes on page 5, a written warning, not a corrective counseling, is the first step in the "Disciplinary Process." While the standard procedure indicates that a written warning may be administered by a lieutenant, the fact is that lieutenants do not issue written warnings on their own but only after approval by a captain or a major, sign-off by a captain or major, and usually an investigation and hearing conducted by a captain, major or director. All the lieutenant does is, once he or she has identified an alleged violation of one of the specified work rules, to complete a Notice of Pending Disciplinary Action (NOPDA) form. The Company work rules (Petitioner's Ex. 1), contains a detailed list of 74 specific violations, including almost everything imaginable from "[s]moking, eating or consuming beverages in areas where it is not allowed" to "[u]nauthorized weapons discharge." The lieutenant does not make a recommendation. (Tr. 122) Following an NOPDA, the responsible major, director, deputy general manager or assistant general manager may assign a lieutenant (a different lieutenant from the one who issued the NOPDA) to conduct an investigation. The investigating lieutenant, after completing the investigation, prepares a report to the major, director, deputy general manager or assistant general manager who reviews the information. A captain, major, or director will then conduct a hearing, in coordination with the Labor Relations Department, at which the employee and his Union representative is present. After the hearing, and only

then, does the person conducting the hearing, either a captain, major, or someone above them in the chain of command, issue disciplinary action. All of this is set out on pages 5-8 of Standard Procedure 1-2550 (Employer's Ex. 9).

The lieutenant who reported the violation did nothing more than report it. The decision to discipline, even a written warning for a minor violation, is done by a higher officer. While the lieutenant may sign the disciplinary action, it is also signed by the captain, major or director who has the authority. See the series of disciplinary actions introduced by the Company, Employer Ex. 16, pages 2, 5, 6, 7, 8, and 9. The testimony of individual lieutenants also showed that they did not exercise any independent judgment in the disciplinary procedure, but simply followed routine tasks in filling out a form, the NOPDA, and identifying one of the 74 rules which has been violated. The decision is then out of their hands. Martin Hewitt, president of the union which represents the SPOs from July 2007 to July 2013, also described the disciplinary process in much the same way. (Tr. 945-51)

Even Director Upshaw explained that, when a lieutenant submits a NOPDA, they do not just take his word for it but the major or captain has another lieutenant "conduct a thorough investigation." (Tr. 126) As Upshaw agreed, if the major or captain thinks written warning is appropriate, he either issues it or tells the lieutenant to issue it. (Tr. 130)

The Company argues that lieutenants exercise discretion because they decide which work rule an employee appears to have violated, as some actions could arguably be considered as coming under two different rules. (EPFR, p. 34) The fact of the matter is

that, regardless what work rule the lieutenant puts in the NOPDA form, the final decision is made by someone superior to him.

The power to "point out and correct deficiencies" in the job performance of other employees "does not establish the authority to discipline." *Franklin Home Health Agency*, 337 NLRB 826, 830 (2002), citing *Crittenton Hospital*, supra at 879. Reporting on incidents of employee misconduct is not supervisory if the reports do not always lead to discipline, and do not contain disciplinary recommendations. See Ten Broeck Commons, 320 NLRB 806, 812 (1996).

The testimony of various lieutenants and others confirmed that their issuing of NOPDAs is merely routine and does not constitute discipline, that they have no authority either to issue discipline or to determine the amount of discipline or effectively to recommend discipline, and that they rarely issue an NOPDA or a corrective counseling.

Lt. Alex Neupert, a lieutenant since 1993, explained that he checks with a captain or major before issuing an NOPDA, even though the work rules are very specific. (Tr. 810-12) Like many other lieutenants, he has issued an NOPDA only rarely, not having issued one within the last year. (Tr. 813) At times, he has reported a violation to his superiors, but no discipline was issued. (Tr. 816) His role, even as a lieutenant who investigates an infraction, is very limited. A captain or a major has never asked him for a recommendation about what discipline to give, and only once has a director asked him for a recommendation, and that was just shortly before the hearing. (Tr. 814) Even then, the director did not follow his recommendation. (Tr. 815)

Rule 2 of the Company work rules (Petitioner Ex. 1) provides for a written warning for four attendance discrepancies within a 90-day period, which usually means four

tardies. As Neupert and other witnesses testified, there is no "wiggle room" with regard to tardies because it is "black and white, because it is computerized." The tracking system tells you when a person has been tardy four times. (Tr. 818) The Labor Relations Department has instructed Neupert that the Union which represents the SPOs, SOs and CAS employees wants the tardy policy followed strictly in order to avoid the appearance of favoritism. (Tr. 818) The only basis he has for excusing a tardy is because of an act of God, a weather condition, or an accident on a highway that stopped traffic that impacted more than one individual. (Tr. 819) While other lieutenants may assume more authority (whether justified or not), the record testimony of Lt. Neupert supports the RD's determination that the power to excuse a tardy is governed by precise rules and is not based on independent judgment. In any case, a tardy is not discipline, and before any employee receives as much as a written warning, he must first be given a Notice of Pending Disciplinary Action and is entitled to a hearing before a captain or major who actually decides on discipline.[1]

Although the Company introduced several corrective counselings and written warnings into the record, lieutenants who testified both for the Company and the Petitioner said they only rarely, if ever, issued them. (Tr. 219, 537, 711, 820, 990). Lt. Darren McIver has only done off-the-record verbal counseling except for formal discipline for tardies or a missed appointment. In all of those formal disciplines, it was handled between either the captain or the major of [*sic*, and?] the Union and the individual. (Tr. 711)

[1] An employee does not receive even a written warning, the lowest level of formal discipline, until the employee has received four tardies in 90 days. (Petitioner Ex. 1, p. 1, item 2; Tr. 258)

Lt. Kent Spruill, who testified as a witness for the Company, said it had been several years since he had even issued a written corrective counseling. (Tr. 219) While he has done on-the-spot counseling on a daily basis, he simply counsels and instructs the employee according to the established and procedures, sort of like a team leader. (Tr. 219) He does these on-the-spot counselings based upon his looking at the rules and seeing that an employee was not following them correctly. (Tr. 219) These counselings do not involve independent judgment but involve "[p]rocedural violations – type of stuff." (Tr. 220)

Lt. Vincent Harmon, a lieutenant for the last seven and one half years, has never issued any written warning or reprimand. (Tr. 990) He has issued corrective counseling only twice, and both of those were at the direction of his major. (Tr. 990-91) Lt. Neupert has never issued a corrective counseling. (Tr. 820) Lt. Hornung in the two months he has been a lieutenant has not issued any discipline. (Tr. 537)

For all discipline that is issued, the manager of the Labor Relations Department is responsible for "reviewing all levels of discipline...prior to issuance." Similarly, majors are responsible for reviewing all levels of discipline within his or her work area and they so. (Employer Ex. 9, p. 2) Director Upshaw confirmed that that is true. (Tr. 116, 129) All formal disciplinary actions (written warning and up) are signed by a captain, major, or director as well as a lieutenant. As the RD noted, to confer supervisory status, the Employer must show that the exercise of disciplinary authority leads to a personnel action without the independent investigation or review by management personnel. *Franklin Home Health Agency*, 337 NLRB 826, 830 (2002). To confer 2(11) status, the exercise of disciplinary authority must lead to personnel action, without the independent investigation

or review of other management personnel. *Beverly Health & Rehabilitation Services*, 335 NLRB 635 (2001).

ASSIGNMENT OF EMPLOYEES

The evidence showed that lieutenants do not assign employees to shifts, to a location or work, or to significant overall tasks, using independent judgment, as required by *Oakwood Healthcare, Inc.*, 348 NLRB 686, 689 (2006), and *G4S Regulated Security Solutions, a division of G4S Secure Solutions (USA) Inc.*, 358 NLRB 160 (September 28, 2012). As Lt. Neupert and others testified, SPOs are assigned to a shift according to a rotation which is set up by the OSS (an employee who handles certain administrative functions within a unit and who also oversees the process whereby Pro Force employees receive and turn in their weapons and ammunition). (Tr. 825-26) SPOs are assigned to shifts according to where vacancies occur and in accordance with the collective bargaining agreement between WSI and Local 125. (Tr. 826; Petitioner Ex. 5, Section 13.4, p. 11). As the collective bargaining agreement shows, assignments to an area (such as PPD, SRT, etc.) and to a shift are governed by the collective bargaining agreement. Once acquiring a shift and area assignment, the SPOs rotate on schedules developed by the OSS and which generally have been mutually agreed to by the SPOs in that area. (Tr. 634). As Lt. McIver testified, they have a rotation that was developed by the SPOs, and when a change needs to be made (for example, when a post is added or removed), the major asks the SPOs to figure out how they want to change the rotation. (Tr. 683)

WSI relies on the testimony one of the lieutenants, Lt. Hornung, who said, and was the only lieutenant to say, that the OSS "does nothing without my permission." (Tr. 579) While he testified that he reviews schedules, he never testified that he has ever changed

one. He may approve a vacation but that is a routine matter of seeing whether others are scheduled for vacation for that time period, as they have to fill a certain number of posts. So if two employees have already scheduled vacation for a day, he tells the third that he has to find his own relief for the vacation he wants. (Tr. 518) This authority is clearly exercised in a routine matter to assure that all the required posts are filled.

While lieutenants must conduct a certain amount of training in their areas, which may be as little as on-the-spot training to correct a problem, the lieutenant is told what training to do and then they simply perform scheduling tasks, to make sure the training does not interfere with other schedules. As Company witness Hornung testified, when another unit asks him about participating in training, there has never been a time when he has not participated. (Tr. 582) When the training center requests that SPOs be sent for training, the OSS simply slots that training into their schedule. (Tr. 791) In recent years the Company has taken away from sergeants the authority to take their teams to the range and run them through courses of firing and training. (Tr. 907)

RESPONSIBLE DIRECTION OF EMPLOYEES

Sergeants

Sergeants in SRT

Sgt. Fish, a sergeant in SRT for almost eighteen years, testified in detail regarding the direction that SRT sergeants give to SPOs that work on their team. During his routine day, he leads a team of three other officers and exercises very little direction or discretion over the three SPOs on his team. Contrary to the Company's claim that no lieutenant or sergeant is manning a post alongside a SPO, Sgt. Fish's testimony showed that sergeants in SRT do that routinely.

As in PPD, the sergeants in SRT are assigned a post along with their team according to a set rotation or schedule. (Tr. 891) Once the team gets to a post, the whole team works together, such as in conducting inventory. When the team uses two separate vehicles, the sergeant and an SPO do the inventory in their vehicle, and the other two SPOs do inventory in their vehicle. They follow the same procedure for checking that the vehicle is operational, has fuel, etc. (Tr. 893-94) Then the team assumes patrolling duty, listening to the radio and responding to alarms. On four posts, he is with only one SPO, while the other two SPOs are at another location, and on one post he is with the whole team of three SPOs. (Tr. 894) When he is with just one other SPO, the other two are performing the same duties that he is performing, except in a different area. (Tr. 894-95)

Fish agreed that he was a "team leader" for the team but that his "duties are the same duties as the SPO. I respond with them." (Tr. 895) While he has tactical control over the team when he is with the whole team and acts as the communications leader, he is the one who is normally on the radio. (Tr. 895) The fact that an individual with greater skills (such as that received by sergeants and lieutenants in some extra training they receive) than his co-workers gives instruction and minor orders to employees does not in itself vest him with supervisor status. *Byers Engineering Corp.*, 324 NLRB 740, 741 (1997).

The SPOs in SRT are all SPO3s, who have the highest level of training and qualifications. (Tr. 64-65) The sergeant has the same training as the SPOs. He and his SRT team are accustomed to working together, and as a small team, they look out for each other. (Tr. 901) When an incident occurs, policies, procedures, response plans, rules of engagement, and other directives are already in place and the SPOs "will automatically respond to either pre-designated positions or positions of advantage." (Tr. 899-900) They

do that on their own a lot of times as he is gearing up and moving into position himself. (Tr. 900) On occasions, team members have acted differently than he has directed or suggested such as one occasion when they ran into adversaries and changed the plan. The SPOs can direct him as the sergeant to put fire somewhere, just as he can direct them to put fire somewhere. (Tr. 900-01) The sergeant and the other members of his team clearly work together as all have most of the same high level training, and they also work independently when necessary, as they all have the same responsibility to protect nuclear material.

Sergeants in SRT clearly function much as or crew leader on a construction job, exercising no real supervisory authority but giving day-to-day guidance and directing some discrete tasks, all of whom are all highly trained, just as he is trained, and have the same qualifications and certifications.

The Company argues that sergeants direct SPOs in firing a machine gun in the helicopter. An SPO in the helicopter who sees an immediate need to fire can do so on his own, provided it is not in a certain area. Two armored vehicles also carry machine guns identical to that in the helicopter. The SPO with the machine gun can and does act on his own, following the same Rules of Engagement as any other member of the Protective Force. Sgt. Fish has witnessed a SPO firing a machine gun ("engaging") without an order to do so just a few weeks before the hearing. (Tr. 898-99)

It is true as the Company argues that sergeants may take over command of an incident, as Fish did for a few seconds during a recent exercise when he thought the lieutenant had been taken out. (Tr. 908) However, a senior SPO may also take command if there is no lieutenant or sergeant available, and one has done so when Fish was taken out.

(Tr. 911) On those occasions, SPOs become tactical leaders, just like a sergeant, leading other SPOs. (Tr. 940)

In sum, as Fish said, all of his decisions are "based inside the policies and procedures, response plans and things like that." If someone asks him a question, he answers it based on those documents. (Tr. 905)

Sergeants in PPD

PPD is responsible for eight barricades, or entrances, to the whole 310 square mile site. Sergeants are assigned only to barricade one and barricade two, which are the two busiest entrances and exits from the plant. The other barricades are staffed by only an SPO or SO without a sergeant. Some barricades are open 24 hours and others only during the day. (Tr. 781)

Three sergeants are assigned to PPD, one covering an early morning schedule beginning at 4:00 a.m. and the other two coming in about 10:00 a.m., so there is a sergeant at barricade one and two during the busiest hours when the production and maintenance employees, contractors and visitors are entering and leaving the facility.

Dean Still, a sergeant in PPD, described in detail his duties and authority in PPD. His testimony fully supports the RD's DDE regarding sergeants.

It is clear from his testimony that he gives very little direction to employees and no evidence suggests that the PPD sergeants give responsible direction. A typical day begins at a barricade when the off-going shift is leaving. The sergeant puts sign-in sheets and scanners on clipboards and makes sure the proper lights on the barricade are working. (Tr. 969-70) During roll call, he tells the employees what post they have been assigned to,

which the OSS has set up on a regular rotation. The sergeant does not have a role in setting up the rotation. (Tr. 970-71) During the rest of the day, he remains at the barricade along with the SPOs and SOs, and when an SPO or SO finds a violation, he receives the information from that person and calls in the license plate number of the vehicle where the employee found the violation. He spends most of his day writing incident reports based on information the SPOs or SOs give him (such as when an SPO finds alcohol or ammunition in a car) and records it in the computer. (Tr. 971-73) The incident reports are done on a template, and he simply follows samples and fills in the blanks. This does not constitute exercising any of the Section 2(11) indicia. The sergeants also run errands "fairly regular[ly]," such as filling heaters at the barricades, or taking water to the posts, all of which happen "fairly regular." (Tr. 966, 973) Sometimes they provide backup for an SPO at one of the barricades where only one officer is stationed, but an SPO would provide backup on barricades one and two. (Tr. 974-75)

In fact, everything that the sergeants do and everything that the SPOs and SOs do on the barricades is governed by detailed instructions. When Still became a sergeant in PPD last November, Maj. Moon told him that there was no need for him to make decisions. He was instructed to "go by the policies and procedures or contact the lieutenant. If the lieutenant doesn't know, they contact the captain or the major." (Tr. 967) The sergeants and the SPOs use several written procedures which are very detailed, dealing with visitor's badges, what persons or vehicles are to be searched, what prohibited items to look for, and so forth, some of which are 50 to 60 pages long. (Tr. 968) When asked on cross examination whether the policies answer every question, he responded: "It answers most of them. I can't think of one that it doesn't." (Tr. 979)

The Employer criticizes the RD for indicating that expert knowledge, intense training, and precise application of detailed standard operating procedures, policies, rules, response plans, security orders, and rules of engagement did not mean they exercised independent judgment. The Employer erroneously relies on *Monongahela Power Co. vs. NLRB*, 657 F.2d 608, 613-14 (4th Cir. 1981) and *Maine Yankee Atomic Power Co. vs. NLRB*, 642 F.2d 347, 363 (1st Cir. 1980). The courts in those cases refused enforcement of Board orders to bargain based on a now outdated standard used by the Board at that time. While the Board has reversed itself twice since then in *Big Rivers Electric Corp.*, 266 NLRB 380 (1983) and *Mississippi Power & Light Co.*, 328 NLRB 965 (1999), the standard today is based on *NLRB v. Kentucky River Comm. Care, Inc.*, 532 U.S. 706 (2001), and *Oakwood Healthcare*, supra. Under *Oakwood Healthcare*, whether individuals give directions based on their expert knowledge and training, if those directions are controlled by detailed instructions, the individual is not a supervisor. *Oakwood Healthcare*, supra at 693. Relying on *Oakwood Healthcare*, the Board in *Entergy Mississippi, Inc.*, 357 NLRB 178 (2011), dealing with the same or a similar category of employees as in the line of cases beginning with *Maine Yankee*, the Board found that they were not supervisors under the *Oakwood Healthcare* standards.

Lieutenants

Picking at inadvertent errors, WSI points out that the RD erroneously stated that there is a major for every shift when there is actually a major for every area. (EPFR, p. 28) The RD, however, correctly stated the following, in analyzing WSI's claim that the lieutenants are in charge on nights and weekends:

> During the day shift SPOs, sergeants, lieutenants, captains, and majors are on site. However, during the night shift and

> weekends the lieutenants are the highest ranking officers on site. Captains and majors are on call during the night and weekend shifts. [DDE, p. 15]

The RD's rejection of this claim is well supported by the evidence. While lieutenants may be the highest ranking officer physically present during off hours, the captains and majors are available by telephone during the off hours. (Tr. 158) If a captain or major is on vacation or otherwise not reachable, someone is appointed to cover his absence and the lieutenants are notified about who is replacing that captain or major. (Tr. 159) If there is a significant incident on the property during off hours, such as an automobile accident, a lieutenant is expected to call his captain or major promptly. (Tr. 159-60)

Lt. McIver agreed:

> They [Captains and Majors] are on call. They are on a notification list. They are the first ones we call that if anything happens that we feel like we need guys on, something that is not necessarily procedure driven. (Tr. 695-96)

McIver calls the captain or major if "something that is not expressly covered by procedure that has happened." (Tr. 697)

The mere fact that lieutenants are the highest ranking officer on duty on nights and weekends does not show that they are statutory supervisors. In *Springfield Terrace, LTD*, 355 NLRB 937, 943 (2010), the Board found charges nurses not to be supervisors even though they were the highest ranking individual in the facility on nights and weekends. While they were considered "in charge," they did not perform any extra duties that they did not perform on days when the administrator and director of nursing were on the premises. Being the highest ranking official on the premises is merely a secondary indication of supervisory authority and cannot by itself confer supervisory status. Citing *Loyalhanna Care Center*, 352 NLRB 863 (2008), the Board found that the fact that having the

administrator and director of nursing available by telephone is further evidence that the charge nurse/LPNs do not exercise independent judgment when they are the highest official on site. The RD followed precedent and the evidence in rejecting this secondary indicium as showing supervisory status.

The Employer's claim (EPFR, p. 29) that the RD erred in finding that work on the barricades does not require quick decisions to be made is fully supported by the testimony of Sgt. Still. (Tr. 967)

Likewise, the Company erroneously claims that the RD's finding that responses in the PPD are governed by policies and procedures is not supported by the record. Again, the testimony of Sgt. Still is clear that their actions are governed by detailed and lengthy policies and procedures. (Tr. 968. 979)

The Employer claims that the RD erroneously found that lieutenants and sergeants man posts along with the SPO bargaining unit. (EPFR p. 30) In fact, the record fully supports that conclusion. As discussed above, the record is full of evidence that sergeants work posts alongside of SPOs. Lt. McIver described that he goes to areas where construction work is in progress to open doors for the construction contractors. (Tr. 674) Like SPOs, lieutenants respond to alarms themselves and perform the same functions as an SPO. (Tr. 679-81)

It is true as WSI states that the lieutenants in all areas conduct post checks, but going from post to post to see that "everybody is good and has everything they need," (Tr. 674) is of a routine nature. Lieutenants use a checklist (Petitioner Ex. 2) for all of their post checks and follow security orders. Everything they check for is covered in the security orders. (Tr. 675)

The Company makes much of the fact that, during an exercise for training purposes, a lieutenant is the response force leader (RFL) and, as such, is the commander for incidents that occur in his area. (EPFR, p. 30) As there has never actually been an attack at the facility, the only time a lieutenant acts as RFL is during training exercises. The Company's argument that response plans simply get an SPO to a particular location from which to start responding, and that from there they are under the direction of the RFL, ignores the testimony, for example, from Lt. Neupert and Lt. McIver that SPOs often act on their own and use the intense training that they have received to deal with the situation.

Lt. Neupert described a typical exercise such as a simulated broken seal on a door or gate. He described how the lieutenant responds, conducting a patrol of the area for unauthorized personnel and coordinating with the OSS to get a new seal and writing an incident report, all of which is done according to established procedures. (Tr. 805) Likewise, Lt. McIver described that, during an armed attack (which as only happened in exercises), he and SPOs go to their designated positions based on the response plans. (Tr. 691-92)

If an exercise involves an simulated attack, SPOs have a protocol on what they are to do and what the procedure calls for, such as shutting down barricades, getting on body armor, and automatically going to a location where they are expected according to the response plan and then to take action on their own, without direction from a lieutenant. (Tr. 821) SPOs are all highly trained, know the response plans, and are expected to follow them. While the Company claims that the lieutenant is in control, the evidence shows that the SPOs responding to the force act on their own. Lt. Neupert described a particular exercise when, according to the response plan, SPOs were responsible for the inside of a

building, but they then moved on their own out of the building and to another area. (Tr. 823) They did so properly and without direction from any lieutenant or response force leader. (Tr. 824)

The Company also argues that the RD erred in finding that lieutenants are not held accountable for their SPO's errors but are simply held accountable for their own mistakes. (EPFR p. 32-33) Showing that a putative supervisor possesses authority responsibly to direct employees requires evidence that the asserted supervisor is "accountable" for subordinates' performance. *Oakwood Healthcare*, 348 NLRB at 691-92; *G4S Regulated Security Solutions*, supra, slip op. 15. The Board in *G4S Regulated Security Solutions,* relying on *Lynwood Manor*, 350 NLRB 489, 490-91 (2007), found that the employer had not met its burden of proving that the lieutenants there were supervisors because, in part, the employer did not prove specific instances in which lieutenants have been disciplined or had their promotion chances reduced as a result of poor guard performance. There, as here, the only evidence of a lieutenant's discipline was for the lieutenant's own mistakes.

In *G4S Regulated Security Solutions*, lieutenants were counseled for their own mistakes in training guards. In the instant case, the only example given was a lieutenant who was disciplined for failing to notify the shift operation manager that a particular door had been exited. (Tr. 424, 427) The lieutenant was supposed to have communicated to the shift operation manager that those particular doors had been breached and failed to do so. (Tr. 427) The discipline which the lieutenant received was because of his own failure, not simply that of the SPOs.

The Company's argues that the Regional Director erroneously relied on the sergeants' and lieutenants' use of their expert knowledge and intense training to conclude

that they did not exercise independent judgment. The Regional Director, however, did not rely solely or even primarily on their expert knowledge and intense training, but primarily relied on their precise application of detailed standard operating procedures, policies, rules, response plans, security orders, and rules of engagement. The record is replete with evidence that, in fact, the sergeants and lieutenants rely on all of these voluminous rules, procedures, and so forth.

In any case, the Court in NLRB v. Kentucky River Comm. Care, Inc., supra at 715, cited by the Company, noted that the NLRB interprets the term "independent judgment" without regard to whether the judgment is exercised using professional or technical expertise. (EPFR p. 37-38) The Regional Director, however, did not rely on the sergeants' or lieutenants' technical or professional expertise. He noted simply that they have expert knowledge and intense training, as the SPOs also have. In fact, both the lieutenants (or sergeants and the SPOs work closely together, all having basically the same training and qualifications, with one of the group acting as a lead, not a Section 2(11) supervisor.

WSI argues that the RD erred in relying on *Chevron U.S.A.*, 309 NLRB 59 (1992), and *Brusco Tug and Barge*, 359 NLRB 43 (2012), pointing out that those employers were in a different business than WSI. Both cases are clearly applicable regardless of the employers' business. As the Regional Director correctly found, even if lieutenants may direct movements by SPOs to meet staffing requirements or to respond to a safety or security incidents, that direction does not rise to the level of independent judgment because they are ad hoc instructions to perform discrete tasks. The same is as true on a tug boat or barge as it is in a nuclear facility.

The RD also correctly noted that events occurring in isolation or on an infrequent basis are generally insufficient for supervisory status, citing Chevron USA, supra. The fact of the matter is that there have been no attacks at the Savannah River Site, so all of the occasions when the Protective Force practices what to do in case of a real attack are only that, mere exercises. But even if one considers lieutenants' and sergeants' giving of minor directions during exercises, WSI has failed to show that those events occur on anything other than an isolated or infrequent basis and has failed to show that the sergeants and lieutenants in fact give those directions other than through detailed instructions. In fact, the evidence shows that SPOs often act on their own, as they are expected to do so.

Therefore, under *Oakwood Healthcare* and *G4S Regulated Security Solutions*, the RD correctly found, based on record evidence, that the Company failed to prove that for every direction lieutenants give during an exercise or otherwise is not "responsible" direction.

LIEUTENANTS' REWARDING OF EMPLOYEES

The Company's argument that the DDE is erroneous on the record on substantial factual issues regarding the authority of lieutenants to reward is premised on the testimony of only one witness, Lt. Gerstenberger, and only with regard to one type of reward, the Coin of Excellence award. The Employer relies on the testimony of Lt. Gerstenberger that he had never had a nomination for Coin of Excellence award rejected. (Tr. 360) The Company argues, based on this testimony, that lieutenants effectively recommend the award even though a major signs off on it. In fact, a major (who are often referred to as managers) has to approve it: "He must agree that the incident or the nomination was worthy." (Tr. 360)

The Company produced no evidence, however, about how many times Gerstenberger has made a nomination for a Coin of Excellence award except his testimony that he submitted two nominations just three days before the hearing began. (Tr. 358) Those two are the only ones he has submitted within the last year. (Tr. 404) The award is nominal, a $25.00 taxable gift certificate. (Tr. 360, 472)

The Company did not prove nominations cannot be made by any employee (just as nominations for the Spot Safety award can be made by any employee). In fact, Maj. Moon, who has worked for the Company since 1985, assumed that an SPO can also make a nomination for a Coin of Excellence award. (Tr. 473)

The award is of nominal value; it appears that anyone can make a nomination; and the Employer produced no evidence that, as a general rule, a lieutenant's nomination is followed. The Employer simply has not met its burden of proof.

LIEUTENANTS' ADJUSTING OF GRIEVANCES

The Company relies on the testimony of a single lieutenant, Lt. Sprouill, to attack the Regional Director's finding that the Company's evidence that lieutenants adjust grievances is insufficient to confer supervisory status. Lt. Sprouill testified in conclusory fashion about his authority but could give no specifics. (Tr. 216-17) Like other lieutenants, he testified that the usual complaints he receives from SPOs are that they have been bypassed for overtime. (Tr. 216-17)

Under the CBA covering the SPOs, the first step of the grievance procedure is verbal notification to the SPO's lieutenant. The grievance is not reduced to writing until the second step which goes to the "Manager," namely, the major. Lieutenants have virtually no authority to adjust a grievance other than those claiming an SPO has been bypassed for an

overtime opportunity (when an OSS failed to follow the list of employees to be offered overtime in accordance with the CBA, Petitioner Ex. 5, p. 9, which requires equalization of overtime opportunities).

As multiple witnesses testified, the overwhelming majority of first step grievances involve overtime bypass claims. For example, Lt. McIver has never been approached by an employee as the first step in the CBA except for a bypass. (Tr. 699) About two to three months before the hearing, an SPO came to McIver stating that he had been by-passed for overtime. McIver went to the OSS and had him check the overtime sign-up sheet for that day and found that "it was pretty simple to see this guy had not been called." (Tr. 699) McIver told him to get the proper by-pass paperwork and he would forward it to the major. He forwarded the information to the major together with the documents that show the SPO was by-passed for overtime. He simply looked at the documentation and determined that the proper procedure had not been followed and the "overtime procedure is very specific." (Tr. 700) In following very specific guidelines, the lieutenants are not using independent judgment.

Lt. Neupert, who has been a lieutenant for 24 years, has received only one grievance other than for overtime by-passes. Someone in another area had given discipline to an employee, and the employee came to Neupert. Neupert told the employee that she could go talk to the person that issued the discipline. She requested to talk to a particular major, which she did. Neupert essentially referred her up the chain of command.

Even Lt. Sprouill, who was called as a witness by the Company, when asked whether he can adjust a grievance, testified that he can look at the overtime procedures and policies and determine whether overtime was offered correctly and, if not, he can correct it. (Tr.

216) Lt. Hornung, called as a Company witness, has never had the opportunity to adjust a grievance. (Tr. 541)

Thus, none of the lieutenants who testified have adjusted grievances other than to check the overtime procedure to see if an employee was by-passed, a routine matter involving simply the review of records, other than Lt. Spruills vague claim that, at some unspecified time in the past, he adjusted a grievance. The Company's proof does not show lieutenants have the requisite authority to adjust grievances to make them statutory supervisors, and the RD's decision on this issue is supported by the evidence.

CONCLUSION

Precedent such as *G4S Regulated Security Solutions*, supra, shows that lieutenants are often found to be employees within the meaning of the Act. Similarly, Regional Directors have found them to be employees.

Regional Director Moore-Duncan of Region 4 addressed a very similar situation in *Wackenhut Corporation*, Case 4-RC-20676 (2003), involving security officers at a nuclear power plant, a copy of which is attached. In that case, the regional director found the "shift supervisors" were employees eligible to vote.

In *Wackenhut Corporation*, the employer produced evidence that the "supervisors" in issue can alter post assignments because of malfunctioning equipment or because of demands of another post to ensure adequate coverage, or when a security officer needs a break or is ill. Also, in that case, while security officers have designated areas to which they report in the case of a security event, the supervisor may alter those assignments depending on the nature of the event or may move officers while an event is in progress if he regards a change of assignment is necessary. In that case supervisors gave oral

counselings. The supervisors there performed annual performance appraisals of security officers and may issue letters of commendation which have some impact on promotions. Supervisors also, on occasion, filled in for absent "team leaders," the next level up from their position, but most did not do so on a regular basis. Nevertheless, the Regional Director found that the work performed by the security officers was dictated largely by established policies and procedures and required little direction. The reassignment of an officer to cover a post she found also to be routine particularly, since the officers, like the SPOs here, all have the same qualifications. Like the Company here, the employer in *Wackenhut Corporation*, failed to prove the so-called "supervisors" had Section 2(11) authority, and the RD here correctly so found.

In *Securitas Critical Infrastructure Services, Inc.*, Case 18-RC-120181,[2] Regional Director Marlin O. Osthus of Region 18 also found that, based on *Oakwood Healthcare* and *G4S Regulated Security Solutions*, the employer there failed to meet its burden of proving that lieutenants were supervisors. Like the lieutenants here, the lieutenants in *Securitas* acted as response team leaders with responsibility to "deploy and redeploy security officers in responding to what is referred to as a contingency event, using guidelines provided by the employer as well as their experience from performing various drills." (p. 5) The lieutenants there issued counseling and corrective action reports to security officers, either verbal or written. There, as here, the lieutenants' authority in issuing these reports was very limited. The lieutenants there recommended discipline, although it was not always followed. While lieutenants there could not assign employees to shifts or teams, they could call security officers for overtime using a rotating seniority list. There, as here,

[2] The Board denied Securitas' request for review of the Regional Director's Decision and Direction of Election by order of April 4, 2014.

the lieutenants could recommend an employee for an award, the employee-of-the-month award, and did so which resulted in an employee winning a monetary award. The lieutenants there, like the lieutenants here, were not involved in the actual selection of the employee-of-the-month.

The Regional Director there found that, with regard to discipline, the lieutenant did "little more than report employee infractions to management," and that such action does not constitute either discipline or the recommendation of discipline, citing *Willamette Industries*, 336 NLRB 743, 743 (2001). The Regional Director rejected the employer's argument that lieutenants exercised authority to assign by assigning security officers to posts, calling them for overtime, preparing the daily work schedule, approving a rotation switch, approving requests for time off, assigning officers to certain tasks as required by compensatory measures, conducting pre-job briefings and ensuring that all officers are fit for duty. In rejecting that argument, the Regional Director noted that the putative supervisor must make decisions "free of the control of others" and "not...dictated or controlled by detailed instructions," citing *Oakwood Healthcare*. The Regional Director relied on a lieutenant's testimony, like the lieutenants here, that their role is "highly regulated and dictated by various procedures and protocols." There, as here, for purposes of overtime, the lieutenant has very specific instructions on how to call employees for overtime. In sum, much like the lieutenants in *Securitas*, the lieutenants here do not have Section 2(11) supervisory authority.

In sum, in finding that WSI failed to meet its burden of proof, the Regional Director followed existing Board precedent and based his decision on sound record evidence.

Respectfully submitted,

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I certify that a copy of the foregoing was served by electronic mail to the following on this 13th day of June 2014:

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